In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. ~~812~~ 92

MABEL BLACK and T. Y. WULFF, in a representative capacity for, by and on behalf of Bio-Lab Union of Local 225, United Office and Professional Workers of America, its officers and members,

Petitioner,

vs.

CUTTER LABORATORIES, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the Supreme Court of the State of California.

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Subject Index

CITATIONS TO OPINIONS BELOW.

The Award of Arbitrators is reported in 15 L.A. 431 and is printed in Appendix B, page 13. The opinion of the Superior Court is reported in 16 L.A. 208, and is printed in Appendix B, page 50. The opinion of the District Court of Appeal, printed in Appendix B, page 54, is reported in 122 A.C.A. 956, 266 Pac. 2d 92. The opinion of the Supreme Court of California, printed in Appendix B, page 78, is reported in 43 A.C. 813, 278 Pac. 2d 905. The appendices to this petition are separately printed.

JURISDICTION.

The judgment of the California Supreme Court (Appendix C) was entered on January 18, 1955. Rehearing was denied on February 16, 1955 and remittitur issued on February 18, 1955 (Appendix C). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The provisions of the United States Constitution involved are Article I, Sections 9 and 10 (obligation of contract and bill of attainder), Article VI (federal supremacy), Amendment XIV (due process and equal protection). They are printed in Appendix A, page 1.

The federal statutory provisions involved are the Internal Security Act of 1950, 50 U.S.C., Section 781, subsections 1, 2, 9, 15, and Section 784 (a) and (b); the Communist Control Act of 1954, 50 U.S.C.A., Section 841,

and the Labor Management Relations Act, 29 U.S.C., Sections 151, 157, 158(a) (1) and (3). They are printed in Appendix A, pages 2-9.

California statutory provisions involved are Sections 1027.5 and 1028 of the California Government Code and Sections 11400 and 11401 of the California Penal Code. They are printed in Appendix A, pages 9-11.

QUESTIONS PRESENTED.

A Board of Arbitrators, acting under a submission contained in a valid collective bargaining agreement, found that a clerk-typist employed by a manufacturer of pharmaceutical and biological products, some of which are purchased by the armed services, had been discharged in violation of the agreement because of her union position and activities, and *not* because she was a Communist, a fact which the Board found had been known to the employer for more than two years and had been waived. The arbitrators ordered the employee reinstated in her former job. The court below vacated the arbitration award on the ground that public policy as expressed in certain federal and state statutes enacted after the making of the collective bargaining agreement, prohibits the employment in such an industry of a person found to have been a Communist. The questions presented are:

(1) Whether the decision below, by denying to petitioner the right to enforce a contract for employment in, and to one of petitioner's members the right to engage in one of the ordinary vocations of life, constitutes State

action depriving petitioner and its members of liberty and property without due process of law, contrary to the Fourteenth Amendment to the United States Constitution.

(2) Whether the decision below constitutes State action depriving petitioner of liberty and property without due process of law, contrary to the Fourteenth Amendment, by virtue of the fact that the court below took judicial notice of the doctrines and practices of the Communist Party, a disputed matter, and failed to give petitioner an opportunity to be heard and to present evidence on the matter.

(3) Whether the decision below, by reason of the fact that without evidence it classifies all Communists, without exception, as dedicated to sabotage, treason and the overthrow of the government by force and violence, constitutes State action denying to petitioner the equal protection of the laws, contrary to the Fourteenth Amendment to the United States Constitution.

(4) Whether the decision below, by construing certain recently enacted federal and state statutes as establishing a public policy which deprives petitioner of its right to enforce a previously valid and enforceable contract, entered into before the enactment of those statutes, makes of those statutes, as construed and applied, a law impairing the obligation of contracts, in violation of Article I, Section 10 of the United States Constitution.

(5) Whether the decision below, by giving effect to the Internal Security Act of 1950, the Communist Control Act of 1954 and certain State laws as legislative adjudications that the employee in question is guilty of criminal activities concerning which she has had no judicial trial,

makes of those statutes Bills of Attainder within the meaning of Article I, Sections 9 and 10 of the United States Constitution.

(6) Whether the decision below violates the supremacy clause of the United States Constitution (Article VI) by

(a) Undertaking to regulate the employment rights of Communists in defense industry, a field which Congress preempted and fully occupied in the Internal Security Act of 1950; and

(b) Establishing a rule of law which permits an employer at a critical moment in labor-management relations, to discharge the president of a union on the ground that she is a Communist, where the real purpose of the discharge is to weaken or destroy the union's bargaining effectiveness, and the stated ground of discharge is merely a pretext.

STATEMENT.[1]

Petitioner, hereinafter sometimes called the Union, is a labor organization which at all times material hereto was the collective bargaining representative of respondent's employees. Respondent, Cutter Laboratories, is a corporation engaged at Berkeley, California in the manufacture of biological and pharmaceutical products, some of which are sold to the armed services. The company has not since World War II been subject to security control by the Federal government, nor is it under any contract obligation to any agency of government to discharge "security risks".

[1]Statements of fact contained herein are taken from the Award of Arbitrators, which is set out in full in Appendix B, pp. 13-49.

On July 3, 1948 the Union and respondent entered into a collective bargaining agreement, which was in effect at all times here relevant. The agreement contained, *inter alia*, a pledge by the employer not to interfere with, restrain or coerce employees because of membership or lawful activity in the Union; a guarantee against discharge except for just cause; and provisions for the submission to arbitration of grievances arising under the collective bargaining agreement, the decision of the arbitrator to be "final and binding upon the parties".

On October 6, 1949 Doris Walker was discharged by her employer, Cutter Laboratories. The Union invoked the grievance procedure and, pursuant to the terms of the collective bargaining agreement, the dispute was submitted to a board of three arbitrators, one chosen by each of the disputants, the third a neutral arbitrator selected from a panel named by the American Arbitration Association. The position of the Union was that Mrs. Walker had been discharged because of her lawful union activities and not for just cause. The position of the respondent was that it had discharged Mrs. Walker because she had made false statements in her application for employment, and because she was a Communist, and that these constituted just cause for discharge under the agreement.

After taking considerable evidence the arbitrators (the employer representative dissenting) sustained the position of the Union, and ordered Mrs. Walker reinstated with limited back pay as provided in the agreement. In support of the award the arbitrators made voluminous and detailed findings, which may be briefly summarized

as follows: That Doris Walker is a college and law school graduate and a member of the California bar; that she became dissatisfied with and left the practice of law because she was frustrated in her desire to become a labor lawyer; that to obtain practical experience in the labor field she went into industry, working first in several canneries, then as a CIO organizer and, on October 10, 1949, being hired by Cutter Laboratories; that in her application for employment with respondent she made several false representations, *viz.*, concealed her educational background, status as an attorney, and previous employment history, and falsely stated that she had been employed as file clerk by a non-existent attorney; that Mrs. Walker's explanation of these misrepresentations is that if she had told the truth, respondent would not have hired her; that her first job at Cutter Laboratories was that of label clerk and she was later promoted to clerk-typist; that throughout the three years of her employment her work was consistently satisfactory to the company; that shortly after being hired Mrs. Walker joined the Union and thereafter became increasingly active in it, serving as Shop Chairman, Executive Board member, Chief Shop Steward and eventually being elected President of the Union, a position she was occupying at the time of her discharge; that in July, 1949 the agreement was opened for negotiations on wages and Mrs. Walker was chosen as one of the negotiators for the Union; that the negotiations became increasingly acrimonious and finally, after a Union-sponsored radio broadcast and series of newspaper advertisements which the Company bitterly resented, respondent on October 6, 1949 fired Mrs. Walker in retaliation.

Mrs. Walker took the witness stand during the arbitration hearing. On cross-examination she was asked whether she was or ever had been a member of the Communist Party. The question was objected to by her attorney on various grounds, including the fact that by continuing to employ Mrs. Walker for two and one-half years after becoming convinced that she was a Communist, the Company waived this ground for discharge. Following this Mrs. Walker was asked a series of questions relating to her membership in various Communist Party units, which were objected to on similar grounds.

The arbitrators (with the exception of the Union representative) ruled that the questions were relevant. At the same time, they unanimously decided not to instruct Mrs. Walker to answer the questions if she did not wish to, coupling this ruling with a statement that they would draw "all justifiable inferences" from her refusal. Mrs. Walker then declined to answer the questions on the ground that they were an intrusion into her private, personal beliefs. At the same time, her attorney stated for the record that, without conceding that she is or was a Communist, or that Communism was the real reason for her discharge, "it could stand admitted, for the purposes of decision, that the Company believed in good faith on the basis of evidence that she was a Communist."

The Company likewise refused to answer questions put to its representatives concerning the time and extent of its knowledge of Mrs. Walker's alleged Communist activities. As in the case of the employee, the arbitrators ruled that the questions were material, but declined to put the Company's representatives under legal compul-

sion to answer, coupling this was the same caution about inferences from the refusal to answer.

Mrs. Walker was not asked any questions concerning her knowledge or understanding of the program or activities of the Communist Party. She was not asked whether she, or to her knowledge or belief the Communist Party, believed in or advocated or practiced "sabotage, force, violence or the like."[2] Nor was any other evidence introduced or offer of proof made with respect to the program of the Communist Party, including its asserted dedication to "sabotage, force, violence or the like." Nor was any evidence introduced or offer of proof made that Mrs. Walker personally believed in, advocated, or practised any such program.

Although the record is silent as to both the Communist Party's and Mrs. Walker's personal dedication to "sabotage, force, violence or the like," it does show that throughout the entire period of Mrs. Walker's employment at the plant, including the two and one-half year period after the Company became convinced that she was a Communist, she was permitted free and unrestricted

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[2]The only question asked Mrs. Walker which touched even tangentially on the matter was the following: "Q. (By Mr. Johnson) And isn't it a fact that the reason why you listed those individuals and concocted this fictitious employer was because of the fact that you were a member of the Communist Party at the time and that you desired to get into the Cutter plant in order to carry on more effectively and more actively the program and the activities of the Communist Party?" (Rep. Tr. 598) There was the same objection and declination to answer, and the same ruling that the employee would not be compelled to answer. The question was not followed up or amplified by any questions concerning the alleged "program or activities of the Communist Party," nor was there any offer of proof made as to such program or activities.

access to every part of the plant, and that the Company never thought it necessary to impose any restriction upon her freedom of movement. There was also a finding that during the period of Mrs. Walker's leadership of the Union there was a work stoppage and a strike but "both were directed at wage and contract issues. There is no evidence of any work stoppage, strike or other interference with production the avowed objective of which was political, philosophical, subversive or revolutionary."

Concerning the Company's contention that it had been denied a fair hearing by reason of the arbitrators' refusal to compel Mrs. Walker to answer questions as to Communist affiliation, the arbitrators declared:

> "The Company maintains that the basis for the discharge was two-fold: the omissions and falsifications in the Application for Employment and membership in the Communist Party with the full implications of dedication to sabotage, force, violence and the like, which Party membership is believed to entail.
>
> "That the Company honestly believed all of these things is admitted and the accuracy of those beliefs is established in the record as follows: by admission with respect to the omissions and falsifications in the Application for Employment; and by uncontradicted evidence that the Company's beliefs about the full implications of Party membership were prevalently understood and shared.
>
> "In this view of the record, and we take this view, we are unable to find that the Company has been denied a fair hearing by reason of our refusal to instruct Doris Walker to answer the questions put to her touching this issue. Assuming that her answers would have been favorable to the Company's posi-

tion, they would serve no more than to corroborate what we find is already established by the record; and the Company offers no convincing reason why further corroboration is necessary. The Company's motions are accordingly denied.

"While an employer may have sufficient grounds for a discharge, this collective bargaining agreement presents additional questions: whether in the circumstances the employer may 'justly' act on grounds for discharge which he once had but long failed to exercise; and whether the grounds which he asserts are the real motive for the discharge. Evidence that raises both of these questions is in the record."

The arbitrators also found that in April, 1947, about six months after Mrs. Walker had been hired and after she had become a Union officer, the respondent had her secretly investigated; that from the investigation the Company learned all the essential facts concerning the misrepresentations in Mrs. Walker's employment application and also became convinced that she was a Communist; that despite this knowledge the Company sat back and withheld action until "a passionate climax in the middle of a stubbornly contested wage negotiation"; that the Company's failure to discharge Mrs. Walker for two and one-half years after it learned the facts about the misstatements in her work application and her asserted Communist affiliations rendered those grounds stale and constituted a waiver; that the grounds advanced by the respondent were not the true reasons for its action and that Mrs. Walker was actually discharged because of her Union position and activities, especially in regard to the pending wage negotiations.

Under California procedure[3] petitioner moved the Superior Court for an order confirming the award, and respondent filed a motion to vacate. The Superior Court rendered judgment confirming the award. Respondent appealed to the District Court of Appeal, which unanimously affirmed the judgment of the Superior Court. Respondent then sought and obtained review by the Supreme Court of California, which by a vote of four to three reversed the judgment, holding that despite the collective bargaining agreement and the arbitration award which had found the discharge of Mrs. Walker to be in violation of that agreement, the direction that she be reinstated to employment in "a plant which produces antibiotics used by both the military and civilians" is against public policy, as expressed in the following federal and state laws:

1. Preamble to the Internal Security Act of 1950 (50 U.S.C.A. Sec. 781), enacted September 23, 1950.
2. Smith Act (18 U.S.C.A. Sec. 2385), originally enacted June 28, 1940.
3. Preamble to the Communist Control Act of 1954 (50 U.S.C.A. Sec. 841), enacted August 24, 1954.
4. California Criminal Syndicalism Act (Calif. Penal Code, Secs. 11400-11402), enacted in 1919.
5. California Government Code, Section 1027.5, enacted in 1953, and Section 1028, enacted in 1947.

The opinion likewise referred to various court decisions said to be also indicative of such a public policy.

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[3]Cal. Code Civ. Proc. Sections 1277, 1288.

Mr. Justice Traynor, joined by Mr. Chief Justice Gibson and Mr. Justice Carter, dissented on the grounds that the decision of the majority abrogated by judicial fiat the right of employers and unions to contract for the employment of Communists, and also the right of Communists as a class to enter into binding contracts, and that Congress has already established in the Internal Security Act of 1950 (50 U.S.C.A. 781 et seq.) the policy of the United States with respect to the employment of Communists. On February 16, 1955 the Supreme Court, by the same vote, denied a petition for rehearing. This petition for certiorari followed.

HOW FEDERAL QUESTION IS PRESENTED.

The federal constitutional questions presented herein for review were raised first in petitioner's Petition for Rehearing filed with the Supreme Court of California following that court's adverse decision. The reasons why these questions were not raised at an earlier stage are as follows: Petitioner was successful at all stages of the litigation below prior to the 4 to 3 decision of the Supreme Court of California. Both the Superior Court and the District Court of Appeal upheld the validity of the Award of Arbitrators, basing their decisions on well-established principles of the enforceability of collective bargaining agreements and the finality of arbitration awards. The decision of the Supreme Court was quite unexpected, not only because of the unanimous decisions of the lower courts, but also because the essence of the decision, namely, that a court may take judicial notice

that the Communist Party and, by extension, Doris Walker, advocate sabotage and overthrow of government by force and violence, necessitated the overruling *sub silentio* of the leading California decision of *Communist Party v. Peek* (1942), 20 Cal. 2d 536, written by Chief Justice Gibson, one of the three justices who dissented in the instant case, wherein the court held the exact opposite. Consequently, prior to the surprising decision of the California Supreme Court, petitioner had not been deprived of any federal constitutional right, nor had reasonable grounds to anticipate the deprivation of any such right. Such depriyation occurred for the first time as a result of the decision of the state Supreme Court, and was promptly challenged by the filing of a timely Petition for Rehearing, in accordance with state practice, wherein all of the points brought here for review were raised. A copy of the Petition for Rehearing is included in the certified record filed in this Court. The Supreme Court denied the Petition for Rehearing without opinion, three of the justices, including the Chief Justice, expressing the view that the petition ought to be granted.

REASONS FOR GRANTING THE WRIT.

1. This case presents novel and highly important questions of constitutional law, concerned with the fundamental question of the right of Communists to make a living and the right of labor organizations to make and enforce collective bargaining agreements which, as authoritatively construed, provide for the employment of Communists in industry. The far-reaching implications

of the decision are pithily summed up in the title of an article in the March 25, 1955 issue of "The Reporter" magazine, dealing with the decision in the instant case: "Should Communists Be Allowed to Eat?". With due allowance for journalistic emphasis, the title poses not too inaccurately the issue ultimately raised by the decision. It is true that the majority opinion might be read as limiting the impact of the decision to Communists who are (1) "dedicated to . . . 'sabotage, force, violence and the like' ", and (2) employed in "defense plants". But, as to (1), there is not an iota of evidence in the record that Mrs. Walker believed in or practised any of those offenses; hence the imputation to her of such beliefs must rest solely upon the finding of her membership in the Communist Party. And as to (2), while Cutter Laboratories manufactures biological and pharmaceutical products, including vaccines, which are used by both the military and civilians, it has not been designated as a "defense facility" under Section 784(b) of the Internal Security Act of 1950 (50 U.S.C. Sec. 781 et seq.), authorizing the Secretary of Defense to determine and designate the defense facilities in which Communists may not be employed. Furthermore, there are very few industries which cannot, under the logic of the majority opinion, be held to affect the nation's defense in a degree sufficient to warrant a court in barring Communists from employment. The public policy pronouncements of the opinion are broad enough to apply to every butcher, baker and candlestick maker (at least if any of their products is used by the armed services), since a Communist in the employ of any of them might put poison in the meat, ground glass in the bread, or concealed explosives in the

candlesticks. The possibility that this might occur, despite the absence of the slightest proof that the employee in question believed in or condoned such criminal activities, and, indeed, in the presence of compelling evidence to the contrary, is held to require the discharge of an employee believed to be a Communist. It matters not that the employer, for two and one-half years after he has become convinced that the employee is a Communist, demonstrates his confidence in her by allowing her free and unrestricted movement throughout the plant. It matters not that the employer holds his knowledge of the employee's Communist affiliations in his hip pocket until he gets a chance to use it in order to weaken or destroy the Union of which the employee is the President and moving spirit. According to the majority opinion, any employer having reason to believe that an employee is a Communist, who fails to discharge that employee—union agreements to the contrary notwithstanding—would have no "tenable defense . . . as against an action for damages in a personal injury or wrongful death case arising from the wilful adulteration of its products. . . ." (Appendix B, p. 103). This is because "That acts of sabotage by Communists are reasonably to be expected at any time such acts may be directed by the party leader is not open to question. . . ." (*ibid.*) What employer, faced with this dictum from the highest court of California, could be expected to retain a known or suspected Communist in his employ in any business which by the farthest stretch of imagination could be regarded as affecting the national defense? So far as counsel are aware, no American court has ever gone as far as the court below in denying

the right to engage in the ordinary vocations of life, a right heretofore held to be part of the liberty protected by the Due Process Clause of the Fourteenth Amendment. *Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 116, 122 (1872); *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). It is submitted that the instant case provides this Court with an opportunity to express to the inferior courts of this nation a much needed warning that the Constitution remains in effect even for Communists; that there are limits to the extent to which the 'cold war' justifies the impairment of fundamental rights; and that these limits have been transcended by a decision which denies to Communists the right to work, which means the right to live.

2. We have pointed out the far-reaching effects of the decision below on the employment rights of Communists —or anyone whom an employer may rationally suspect to be a Communist. But the implications of the decision go beyond this. As Justice Traynor's opinion for the dissenting members of the court below pointed out:

> "It is true that in this case only an employment contract is involved. There is nothing in the rationale of the majority opinion, however, that limits its application to such contracts. If it is illegal to employ a Communist, is it illegal to allow a Communist unemployment benefits? If the threat of Communist activity makes an employment contract with a known Communist illegal as against public policy, does it not also invalidate other contracts? Thus, can a landlord break his lease with a Communist on the ground that his building may be sabotaged? Can a

buyer refuse to accept and pay for goods purchased from a Communist on the ground that they may contain cleverly concealed defects? Can a seller refuse to deliver goods sold to a Communist on the ground that they may be used to promote communist activities? Can an owner refuse to pay for construction work by a licensed contractor who is a Communist? Indeed, can a Communist be licensed as a contractor? If contracts with Communists are illegal, cannot Communists themselves violate them with impunity?"

The three justices who concurred in the foregoing view, Justices Traynor, Carter and Chief Justice Gibson, are not alarmists. They are not given to indulging in fantasies merely for the sake of making a point. The implications which the minority justices draw from the majority opinion are inherent in its logic. They add up to the virtual outlawry of an entire class of persons, their conversion into political and economic pariahs. Such a result, certainly in the absence of the gravest possible emergency, cannot be reconciled with the Due Process Clause of the Fourteenth Amendment.

3. Nor can it be reconciled with the Equal Protection Clause. It is, of course, no longer open to question that denial of equal protection of the laws may result from judicial action by a State court. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Barrows v. Jackson*, 346 U.S. 249 (1953). It has already been pointed out that the sentence of economic death passed upon Mrs. Walker was reached without giving her a trial upon any of the issues regarded by the California Supreme Court as decisive. The nature of the teachings and practices of the Communist Party was

not made an issue before the Board of Arbitration. Neither side introduced any evidence or offered to prove that the Communist Party advocated or practiced "sabotage, force, violence, and the like".

Perhaps—and we think it doubtful—the doctrines of the Communist Party may be noticed judicially, although it would appear to be stretching the theory of judicial notice to the breaking point to hold that it may be applied to such a hotly disputed issue: witness the lengthy Smith Act trials with their records filled with sharply opposed quotations and interpretations of Communist doctrine. See *Communist Party v. Peek*, 20 Cal. 2d 536 (1942), overruled *sub silentio* by the decision below.

But it is a long step from the taking of judicial notice of the doctrines of the Communist Party to taking judicial notice that every member of the Communist Party is personally dedicated to "sabotage, force, violence and the like". In *Dennis v. United States*, 341 U.S. 494 (1951) this Court stated emphatically that its decision was based strictly upon the evidence linking the particular defendants in that case to the found conspiracy to teach and advocate the violent overthrow of the government, and promised to scrutinize closely any cases presenting a weaker evidentiary foundation. In *Schneiderman v. United States*, 320 U.S. 118, 157 (1943) the Court pointed out that it is by no means clear that advocacy of violent overthrow of government is a Communist objective and insisted that "under our traditions beliefs are personal and not a matter of mere association, and that men in adhering to a political party or other organization notoriously do not subscribe to all of its platforms or asserted

principles". (*Ibid*, p. 136.)[4] Undoubtedly, guilt by mere membership in the Communist Party, a form of guilt by association, would commend itself to some as an admirably simple way of solving the "Communist problem". The equal protection clause of the Fourteenth Amendment, however, stands in the way of such a "solution". That clause condemns as arbitrary and discriminatory a rule of law which assumes, contrary to experience and without valid proof, that every member of the Communist Party is ready to commit such monstrous crimes as sabotage, sedition and treason. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Truax v. Raich*, 239 U.S. 33, 41 (1915); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Kotch v. Board of River Pilot Commissioners*, 330 U.S. 552, 556 (1947).

That the principle that guilt is personal, rather than established merely by association, has not vanished from our law since the day of the *Schneiderman* decision is indicated by holdings such as *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Adler v. Board of Education*, 342 U.S. 485 (1952); *Garner v. Board of Public Works*, 341 U.S. 716 (1951); and *Gerende v. Board of Supervisors*, 341 U.S. 561 (1951). Central to each of these decisions is the concept that guilty knowledge of the doctrines of a party or organization may not, without more, be imputed to every member thereof by reason of membership alone. Government employees were the beneficiaries of these enlightened decisions, but there is no reason for

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[4] The Government in the *Schneiderman* case even admitted, with what the Court termed "commendable candor" (320 U.S. at 148), "the presence of sharply conflicting views on the issue of force and violence as a Party principle."

denying the benefit of the principle to an employee of a private employer.

Respondent argues, however, that there was a specific "finding" by the arbitrarors that Mrs. Walker was dedicated to "sabotage, force, violence and the like", and hence no denial of equal protection of the laws. We deny that there was any such finding. Respondent, although it advanced the same contention repeatedly in the lower courts, has yet to point out any evidence in the record on which the finding could be based, apart from the bare fact of membership in the Communist Party.

The language in the Award of Arbitrators which respondent construes as a finding that Mrs. Walker is dedicated to sabotage, etc. has previously been quoted. (*Supra*, pp. 10-11.) It is admittedly unclear. The reference to "membership in the Communist Party with the full implications of dedication to sabotage, force, violence and the like, which Party membership is believed to entail" is followed immediately by the assertion:

> "That the Company honestly believed all of these things is admitted and the accuracy of this belief is established in the record as follows . . . by undenied and uncontradicted evidence with respect to the membership in the Communist Party; and by uncontradicted evidence that the Company's beliefs were prevalently understood and shared."

That the language quoted above was intended to constitute a finding that Mrs. Walker was addicted to "sabotage, force, violence and the like" must be doubted, not only because of the entire absence of evidence on

the point, but even more strongly because of the contrary *specific* finding, based on sworn testimony, that during the entire period of Mrs. Walker's tenure as a union officer, there was no "work stoppage, strike, or other interference with production the avowed objective of which was political, philosophical, subversive or revolutionary". (App. B, p. 23.)

The most probable and natural interpretation of this unclear declaration regarding "sabotage, force, violence and the like" is that the arbitrators intended to convey the idea that *the Company's beliefs* as to the implications of Communist Party membership were honestly held, as indicated, among other things, by the fact that these beliefs "were prevalently understood and shared," i.e. that a great many other persons were of the same opinion. The reference to the "accuracy" of the Company's beliefs cannot have been meant as a finding that the beliefs were actually true, since the reference is followed by a recitation of the evidence which demonstrates that "accuracy", none of which relates to proof of "sabotage, force, violence and the like". Hence it is most likely that the word "accuracy" was used in a sense akin to "reasonableness" or "plausibility". The entire tenor of the arbitration opinion supports this interpretation, including the fact that the arbitrators, mature, experienced and responsible men, ordered the Company to take Mrs. Walker back into its employ.

In the absence of any evidentially supported finding that the discharged employee was "dedicated" to sabotage and other crimes, the entire structure of respondent's argument—and of the decision of the court below

—breaks down. Yet the only statement even approximating such a finding is the highly ambiguous remark quoted above. On this tenuous foundation the court below erected the logical edifice which led it to conclude that the continued employment of Doris Walker as a clerk-typist at Cutter Laboratories is a menace to the country and its institutions.

4. Not only substantive but procedural due process was denied to petitioner by the decision of the California Supreme Court. That decision, as has been pointed out, was unexpected both because it overruled a precedent of long standing (*Communist Party v. Peek*, 20 Cal. 2d 536 (1942)), and because it came on the heels of the contrary decision of three tribunals: The Board of Arbitration, the Superior Court, and the District Court of Appeal. In none of those tribunals were the doctrines of the Communist Party, or Mrs. Walker's own political views, regarded by the adjudicating body as material in the particular posture of the case, especially in view of the respondent's inactivity for two and one-half years after it became convinced that Mrs. Walker was a Communist. Not until the issuance of the majority opinion of the court below was the petitioner put on notice that such matters were regarded by an adjudicating agency as material. Petitioner has therefore never had a proper opportunity to present evidence in rebuttal of the views concerning Communism presented in the opinion of the court below, and has therefore been deprived of procedural due process of law. *Saunders v. Shaw*, 244 U.S. 317 (1916); *Ohio Bell Tel. Co. v. Public Utilities Comm.*, 301 U.S. 292, 301-302 (1936).

Respondent contended below, and presumably will argue here, that petitioner had two opportunities to present evidence as to the doctrines of the Communist Party. The first such occasion is said to have occurred during the arbitration hearing, when Mrs. Walker declined to answer questions as to her membership in the Communist Party, and was informed by the Board of Arbitration that it would draw "all justifiable inferences" from her refusal to answer. The short answer is that the arbitrators sustained the Union's position that the Communist issue, whatever its original merits as a cause for discharge, had been waived by the employer's failure to assert it in time. What need, therefore, to explore the doctrines of the Communist Party or Mrs. Walker's understanding of those doctrines? In addition, it may be doubted that dedication to sabotage, force and violence is one of the "justifiable inferences" legitimately to be drawn from a simple refusal to answer questions as to membership in the Communist Party.

The second supposed opportunity to be heard on the doctrines of the Communist Party is said to have occurred in connection with the enforcement proceeding in the Superior Court. Here, again, the court upheld the position of the arbitrators that the Company had waived its right to urge the Communist issue. (App. B, p. 51.) It would therefore have been a work of supererogation for petitioner to delve into the doctrines of the Communist Party. Moreover, respondent knows, or ought to know, that under California law a court has no authority to take additional evidence with respect to matters presented before a Board of Arbitration. *Kerr v. Nelson*, 7 Cal. 2d 85, 89-90 (1936).

5. It is not only the Fourteenth Amendment which suffers from the effects of the decision below. If there be any vitality left in that provision of the Constitution which prohibits a State from impairing the obligation of contracts (Article I, Section X), surely the decision below cannot be permitted to stand. Let us make our position clear. It is not contended that any person has a vested interest that the law laid down in previous decisions shall remain unchanged. It is not contended that the mere fact that a court decision denies enforcement to a contract establishes, in and of itself, an impairment of the obligation of contract in the constitutional sense.

Here, however, the collective bargaining contract was entered into on June 23, 1948. Mrs. Walker was an employee at that time, entitled to the rights conferred on employees by the contract. She was discharged on October 16, 1949, and her right to invoke the remedy set out in the contract vested on that date.

The court below does not hold that the contract was invalid and unenforceable when entered into, nor that it was invalid or unenforceable on October 16, 1949. It predicates the denial of remedy on a "public policy". But this public policy was not in existence on October 16, 1949, and could not have been, because it is based on the findings recited in state and federal legislation enacted after that date.[5]

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[5]The court does refer to two statutes enacted prior to the date of Mrs. Walker's discharge: the federal Smith Act and the state criminal syndicalism law. Neither of these, however, mentions the Communist Party by name or contains any findings of fact. They could not, therefore, serve as the basis of denying a contractual right to an alleged Communist who had not been convicted or in-

It appears, therefore, that the contractual remedy available to the Union and to the employee on October 16, 1949 has disappeared because the court below held that subsequent state and federal legislation should be construed to have this effect. The obligation of the antecedent collective bargaining contract was thereby impaired.

It was impaired, moreover, not by the decision of the court, but by the statutory policy which was construed as requiring that decision. In the words of this Court in *Columbia Railway v. South Carolina*, 261 U.S. 236, 245 (1923):

> ". . . although the state court may have construed the contract and placed its decision distinctly upon its own construction, if it appear, upon examination, that in real substance and effect, force has been given to the statute complained of . . ."

a constitutional issue under Article I, Section 10 is presented.

> "In such a case [the United States Supreme Court] accepts the meaning put upon the impairing statute by the state court as authoritative, but it is the statute, as enforced by the state, through its courts, which impairs the contract, not the judgment of the court."
>
> *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 453 (1924).

Nor is the impairing effect of the statutes avoided because some of them are federal rather than state laws.

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dicted for violating either of them. The court decisions cited by the court below in support of its public policy argument were likewise decided after the contract was made and the employee's right to a remedy had vested.

The provision that "No State shall pass any law impairing the Obligation of Contracts" means also that a state cannot "accomplish the same end by granting any permission necessary to enable Congress to do so".

Ashton v. Cameron County Dist., 298 U.S. 513, 531 (1936).

"The constitutional provision prohibiting a State from passing a law impairing the obligation of contracts equally prohibits a State from enforcing as a law an enactment of that character from whatever source originating."

Williams v. Bruffy, 96 U.S. 176, 184 (1877).

There would appear to be no escape from the conclusion that the retroactive application of statute in this case, by depriving the Union and the employee of a remedy which had vested previously, impaired the obligation of a valid collective bargaining contract—except perhaps by taking refuge in the undefined and undefinable sanctuary of the police power. A leap into that uncharted sea would be tantamount to a confession that petitioner's position here is well taken.

6. The court below catalogued a series of felonies of which it held Mrs. Walker to be actually or potentially guilty. She is said to be "a person . . . who is known to have dedicated herself to the service of a foreign power and to the practice of sabotage to the end of overthrowing our government". It is said to have been "conclusively established that . . . [she] cannot be loyal to [her] private employer as against any directive of [her] Communist master". Her employment would give rise to a "possibility of 'sabotage, force, violence and the like,'"

although her employment for the previous three years produced nothing of the sort. It is anticipated that she may engage in "wilful adulteration" of the Company's products. "Acts of sabotage . . . are reasonably to be expected [from her] at any time." It is at least intimated that she may have committed a violation of the Smith Act and of the state criminal syndicalism statute.

Mrs. Walker has not had the benefit of a judicial trial on any of these charges. The charges are not based on evidence that Mrs. Walker has herself engaged in any of the activities described. They result solely from applying to the employee personally the findings of Congress and of the State Legislature with respect to the Communist Party. The only link between these legislative findings and Mrs. Walker is some evidence in the arbitration proceedings tending to show that she was, or had been, a member of the Communist Party, and the fact that, on advice of counsel, she refused to affirm or deny such membership.

To hold a person guilty of such crimes, utilizing as proof of guilt only the "findings" of Congress in the prologues to legislation such as the Internal Security Act of 1950 and the Communist Control Act of 1954, and similar recitations in state legislation, is to give effect to such legislation as bills of attainder, thereby grossly violating the provisions of Article I, Sections IX and X of the Constitution. Mrs. Walker has suffered "punishment without the safeguards of a judicial trial", a thing which the Constitution declares "cannot be done either by a state or by the United States." *United States v. Lovett*,

328 U.S. 303, 316-317 (1946). That the deprivation of one's right to earn a living and to make and benefit from contracts of employment is "punishment" in the constitutional sense cannot be doubted. *Cummings v. Missouri*, 4 Wall. (71 U.S.) 277, 321-322 (1866); *Ex Parte Garland*, 4 Wall. (71 U.S.) 333, 377 (1866); *United States v. Lovett*, 328 U.S. 303, 315-316 (1946). Nor should the illusion be entertained that the threat to constitutional liberties may be ignored because the objects of attainder are Communists, a political group which has been described judicially as "so extremely unpopular with a vastly preponderant majority of the citizenry of our country as to amount virtually to an anathema in the public mind". (*Commonwealth v. Nelson*, 377 Pa. 58, 104 A. 2d 133, 135 (1954).) The constitutional prohibition of bills of attainder was adopted for the very purpose of safeguarding unpopular minorities against legislative determination of guilt and infliction of punishment. The colonies resorted to a rash of such bills during the struggle for independence, as a result of the fact that persons who refused to give up their allegiance to the crown were popularly regarded as internal enemies allied with a foreign invader. Thompson, *Anti-Loyalist Legislation During the American Revolution*, 3 Ill. Law Rev. 81 (1908). State legislatures freely characterized all loyalists as persons pursuing "diabolical plans" and "guilty of such atrocious and unnatural crimes against their country that every friend of mankind ought to forsake and detest them." (*Ibid.*, p. 147.)

> "It was against the excited action of the States, under such influences as these, that the framers of

the Federal Constitution intended to guard" (by the bill of attainder clause).

Cummings v. Missouri, 4 Wall. (71 U.S.) 277, 322 (1866).

Mutatis mutandis, the foregoing would serve today as an accurate description of those forces which, under the influence of the passions generated by the 'cold war', would countenance the destruction of our most precious liberties upon the ground of presumed necessity for the defense of our way of life against Communist subversion.

7. Finally, the decision below poses serious questions as to the relationship between State and Nation in the delicate sphere of internal security, with overtones involving foreign policy. The opinion denies the right of Communists to employment in every branch of industry affecting national defense. To "provide for the common defense . . . of the United States" is, however, one of the powers expressly granted to Congress by the Constitution (Article I, Section VIII), and Congress has already enacted a comprehensive scheme dealing with the employment of Communists in defense industries. We refer to the Internal Security Act of 1950 (50 U.S.C. Sec. 781, et seq.). Congress in that Act rejected the blanket exclusion of Communists from defense employment. As the dissenting justices pointed out, Congress did not "prohibit all hiring of Communists nor did it leave to the courts the decision as to what jobs Communists might hold. It provided instead that the Secretary of Defense should determine and designate the defense facilities in which members of Communist-action organizations should

not be employed."[6] Thus the Court below has chosen to enact through the imprecise method of a declaration of public policy, what Congress has expressly declined to enact through the far more precise and workable method of legislation. In so doing the court has trespassed upon a field which the Congress, both by its actions and by its failure to act,[7] has demonstrated an intention to reserve to itself, and one, moreover, "so intimately blended and intertwined with responsibilities of the national government" (*Hines v. Davidowitz*, 312 U.S. 52, 66 (1941)) that its nature alone raises an inference of exclusion of State action. (Cf., *Commonwealth v. Nelson*, 377 Pa. 58, 104 Atl. 2d 133 (1954), cert. granted October 14, 1954, which poses a cognate question concerning the respective spheres of national and state action in the field of internal security, and which perhaps ought to be set for argument proximate to the instant case in the event that certiorari is granted herein.)

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[6]Cutter Laboratories is not so designated.

[7]During the last session of Congress twin measures (S. 3428 and H. J. Res. 527) were introduced which sought to impose a blanket ban on the employability of Communists in defense industries. The bills failed of passage. The House Judiciary Committee, in its adverse report on H. J. Res. 527, declared that "the language of the proposed measure is not sufficiently carefully drawn so as to enhance the security of the United States on the one hand, but not to limit the constitutional rights of individuals on the other hand." Declaring that it lacked sufficient information on the subject to enable it to present appropriate legislation to the House for passage, and rather than recommend "measures hastily drawn and obviously inadequate," the Judiciary Committee went on to urge "a thorough study by an impartial public commission appointed by the President of the United States should be made so as to give the Congress the benefit of impartial study and expert recommendations."

8. Federal supremacy is undermined by the decision below in yet another field, that of labor relations. Congress in the Labor-Management Relations Act of 1947, 29 U.S.C. 141 et seq., adopted a comprehensive system for the regulation of labor relations in all industries affecting commerce. Central to that system is Section 7, which was inherited from the Wagner Act and re-enacted in the Taft-Hartley Act without change material in the present context. That section contains a federally guaranteed right to self-organization and to bargain collectively through freely chosen representatives. Implementing Section 7 are the provisions of Section 8(a)(1) and (3), the latter subsection barring discrimination because of union membership or activities.

The decision below is in irreconcilable conflict with the cited provisions. The court announces a principle that the discriminatory discharge of the leader of a union, a discharge found to have been deliberately timed to take effect at the moment when it could most [illegible]ken the union, is justified if the immediate victim happens to be a Communist. The fact that the *union* is the ultimate victim of the employer's discriminatory action is given no weight by the court, which treats the issue as if it were merely a matter between the discharged employee and the employer. Section 8(a)(3) is thus set at nought. See *Hill v. Florida*, 325 U.S. 538 (1945); *Weber v. Anheuser Busch, Inc.*, 75 S.Ct. 480, 99 L.Ed. 386 (March 28, 1955), and cases summarized therein.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated, Oakland, California,
May 11, 1955.

Respectfully submitted,

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